

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALLEN HURD,

Defendant-Appellant.

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UNPUBLISHED

June 20, 1997

No. 187916

Sanilac County

LC No. 95-004287-FC

Before: Reilly, P.J., and Wahls and N.O. Holowka,\* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). He was sentenced to two concurrent twenty-five to forty-five year terms of imprisonment. We affirm.

Defendant first argues that the trial court erred in allowing nurse practitioner Sharon Johnston to testify as an expert regarding the tendency of child victims of sexual abuse to delay in reporting it. We disagree. In his opening statement, defense counsel asserted that the complainant's testimony was not credible in part because she had never previously reported the sexual abuse. Johnston's testimony tended to support the complainant's credibility in the face of this challenge and therefore was relevant. *People v Peterson*, 450 Mich 349, 379-380; 537 NW2d 857 (1995). Further, Johnston's extensive training and experience demonstrate that the trial court did not err in allowing her to testify as an expert in this regard. Any weaknesses in her qualifications go to the weight of her testimony rather than its admissibility. *People v Gambrell*, 429 Mich 401, 408; 415 NW2d 202 (1987).

Defendant next argues that the trial court erred in finding that evidence of other uncharged instances of sexual abuse perpetrated by him upon the victim were admissible. We disagree. As the trial court noted, our Supreme Court has ruled that evidence of a sexual act between the defendant and the victim preceding the one charged is admissible when the defendant is a member of the victim's household. *People v Jones*, 417 Mich 285; 335 NW2d 465 (1983). Additionally, defendant did not argue below that the evidence should not be admitted because the prosecution did not provide timely

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\* Circuit judge, sitting on the Court of Appeals by assignment.

notice of its intention to introduce such evidence. Therefore, that issue is not properly before this Court. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988).

Defendant next argues that the trial court erred in not giving a cautionary instruction that would have advised the jury not to use Johnston's testimony or the evidence of other similar acts committed by defendant as substantive evidence of his guilt. We disagree. While defendant insists that the trial court was duty bound to give CJI2d 20.28 and CJI2d 20.29, the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court and their usage is not mandatory. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). Further, defendant's failure to object to the lack of a limiting instruction precludes reversal of the verdict on this basis. *People v Hendricks*, 446 Mich 435, 440; 521 NW2d 546 (1994). In this regard, defendant also alleges that he was denied the effective assistance of counsel when his trial counsel failed to request such a limiting instruction. However, trial counsel's failure to request such an instruction can be viewed as trial strategy because he may have thought it would be counterproductive to emphasize to the jury the prior acts. Thus, it cannot support defendant's claim of ineffective assistance. *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant next argues that the trial court abused its discretion during sentencing by focusing solely on the negative aspects of the crime and by failing to consider defendant's potential for reformation and the fact that this was defendant's first conviction. However, defendant failed to raise this issue below and therefore it is not preserved for review. *People v Hamacher*, 432 Mich 157, 168; 438 NW2d 43 (1989).

Defendant also argues that the trial court incorrectly scored offense variable 25 by giving defendant fifteen points for three or more contemporaneous criminal acts. We disagree. The complainant's testimony at trial, indicating that defendant had sexual relations with her at least once a month in the six months preceding the charged offenses, supported the score given. Defendant was not facing conviction on these uncharged offenses. Thus, the trial court's ruling on this issue will not be overturned. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

Defendant further argues that his sentence is disproportionate because the sentencing judge failed to consider the circumstances surrounding the offense and the offender. We disagree. Contrary to defendant's suggestion, a review of the record does not demonstrate that the lower court sentenced defendant harshly to satisfy a sense of community or personal outrage or that the trial court declined to exercise its discretion. Further, although, as defendant argues, a sentence that is presumptively proportionate because it falls within the sentencing guidelines range may still violate the principle of proportionality in some instances, *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), we conclude that defendant's sentence is proportionate to the offense and the offender. *Id.*, p 636.

Defendant finally argues that the trial court erred in denying defendant's request for a presentence psychiatric evaluation on the basis that it was untimely without considering the merits of the request. We disagree. Initially, we note that defendant's cited authority is factually

inapplicable to the issue at hand. Defendant cites *Drope v Missouri*, 420 US 162; 95 S Ct 896; 43 L Ed 103 (1975), and *People v Blocker*, 393 Mich 501; 227 NW2d 767 (1975), for the proposition that courts are reluctant to adjourn proceedings to conduct psychiatric evaluations because these requests are often brought for purposes of delay. Defendant then argues that his purpose was not to delay, as evidenced by the fact that he was already incarcerated. However, *Drope* and *Blocker* both address issues regarding the defendant's competency to stand trial rather than a request for psychiatric evaluation for sentencing purposes.

Defendant next cites several Michigan decisions, arguing that they demonstrate that a request for a psychiatric evaluation prior to sentencing should be granted. These cases also are factually inapplicable. In *People v Shields*, 12 Mich App 154; 162 NW2d 679 (1968), aff'd 382 Mich 593; 171 NW2d 435 (1969), this Court addressed a question of statutory interpretation regarding a request for psychiatric evaluation under MCL 780.503, MSA 28.967(3), which was repealed in 1967. In *People v Kearns*, 25 Mich App 579, 584-585; 181 NW2d 548 (1970), the trial court ordered a presentencing psychiatric evaluation and determined that the defendant was competent to stand trial when he pleaded guilty. This Court found that the record supported the determination that the defendant was competent to stand trial. In *People v Thompson*, 40 Mich App 445; 198 NW2d 890 (1972), the trial court ordered a psychiatric evaluation, but the defendant, displeased with the results, wanted another one done. This Court said that the trial court did not err in refusing to order another.

Defendant also cites *People v Seefeld*, 95 Mich App 197, 199; 290 NW2d 123 (1980), and *People v Blue*, 428 Mich 684, 691-692; 411 NW2d 457 (1987), in support of his argument. However, in both cases the Court determined that, pursuant to MCL 768.36(2); MSA 28.1059(2), a plea of "guilty but mentally ill" cannot be accepted prior to a psychiatric evaluation being submitted. The Court reversed because the plea had not been entered pursuant to the statute. Because such a plea is not the basis of defendant's conviction, these cases are not instructive.

Moreover, as the presentence investigation report complied with the statutory requirements of MCL 771.14; MSA 28.1144, and defendant does not argue that it was inaccurate or misleading, we conclude that the trial court did not abuse its discretion in sentencing defendant without the benefit of a psychiatric evaluation of defendant. See *People v Young*, 183 Mich App 146, 147-148; 454 NW2d 182 (1990).

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick O. Holowka